

ADMINISTRATIVE APPEAL DECISION

Dodson Farm, LLC; FILE NO. CENAO-2007-3583

NORFOLK DISTRICT

22 December 2008

Review Officer: Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division

Appellant: Dodson Farm, LLC

Appellant's agents: Mark Baumgartner, Pender and Coward, LLP, Attorneys at Law
Chuck Wolfe, Wolfe Environmental and Engineering Consultants, Inc.

Date of Receipt of Request for Appeal: 14 May 2008

Date of Acceptance of Request for Appeal: 6 June 2008

Appeal Conference/Site Visit Date: 10 July 2008

NAD-ACCEPTED REASON FOR APPEAL:

NAD accepted the following reason for appeal as detailed by the agent in the attachment to the Request for Appeal dated 14 May 2008:

The administrative record does not support the District's determination that Tributary A is a "water of the United States."

SUMMARY OF DECISION:

The appellant's request for appeal has merit. The administrative record does not support the District's determination that Tributary A is a relatively permanent water (RPW) subject to jurisdiction as a water of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344).

BACKGROUND INFORMATION:

Dodson Farm, LLC is appealing the Norfolk District's decision to take jurisdiction over waters on property located in the vicinity of Shipp's Corner Road and Old Clubhouse Road in Virginia Beach, VA.

Acting on behalf of the appellant, Chuck Wolfe of Wolfe Environmental and Engineering Consultants submitted correspondence to the Norfolk District dated 21 August 2007 requesting a jurisdictional determination (JD) for the above referenced property. The submittal contained several maps generically identifying the property limits and several ditches and onsite wetlands. Mr. Wolfe stated that he does not believe wetlands or waters on the site should be subject to jurisdiction under the Clean Water Act based on numerous site visits and information obtained during evaluation of the property. He stated that he does not think the ditches were RPWs subject to jurisdiction as a waters of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344). Nor did Mr. Wolfe believe that the wetlands or ditches on the site had a significant nexus with traditionally navigable waters.

The district conducted a site visit on 3 December 2007. Following the site visit, the District project manager and Mr. Wolfe exchanged numerous emails regarding the details of the JD. Specifically, the e-mails clarified which ditches on the site are identified as Tributaries A, B and C. The fact that an approved JD could not be issued for the onsite wetlands due to the lack of a wetland delineation was also clarified. On 14 March 2008, the District issued an approved JD for the three tributaries located onsite. The JD stated that Tributary A is a RPW subject to jurisdiction under the Clean Water Act and that Tributaries B and C were determined to not be jurisdictional waters under the Clean Water Act. The JD letter also stated that there may be additional jurisdictional wetlands on the site and that a wetland determination must be completed and confirmed prior to starting any work on the site.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION:

- 1) The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
- 2) With the request for appeal, the appellant provided documents containing their comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:

Appeal Reason 1: The administrative record does not support the District's determination that Tributary A is a "water of the United States."

Finding: This reason for appeal has merit because the administrative record does not clearly support the District's determination that Tributary A typically flows year round or has continuous flow at least seasonally (e.g. typically 3 months) to be a RPW subject to jurisdiction as a water of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344).

Discussion:

The appellant's argument that the administrative record does not support the District's determination that Tributary A is a "water of the United States" is correct. The administrative record provides detail supporting that Tributary A has an ordinary high water mark, that standing water was present during the 3 December 2007 site visit, that hydrophytic vegetation is growing in the upper reaches of the tributary and that the ditch appears to have been dug out of wetlands. However, it does not support the district's position that the hydrology is present to the extent that the tributary is a RPW that typically flows year round or has continuous flow at least seasonally (e.g. typically 3 months).

Action: The District should further analyze various resources such as soils maps and data, NWI maps, aerial photographs, personal communications and document them in the administrative record to determine and support the flow characteristics in Tributary A. The District's documentation and research should include, but not be limited to talking to adjacent property owners and local Department of Transportation representatives to identify the stream's hydrology, including groundwater levels, soil types, length of inundation and other information to document the frequency, duration and volume of flows in Tributary A. The administrative record should be revised accordingly to reflect the additional information.

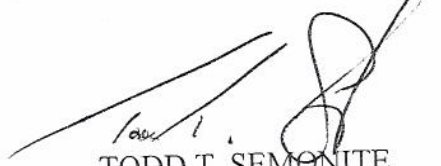
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Harmless errors including inconsistencies on whether the ditch was dug through uplands or wetlands were included in the approved JD form. The JD form should be reviewed and corrected as necessary to ensure that all information contained in the form is factual and accurate.

OVERALL CONCLUSION:

For the reasons stated above, I find that the appeal has merit since the District's administrative record does not support its decision that Tributary A is subject to federal jurisdiction and regulation as a water of the United States under Section 404 of the Clean Water Act (33 U.S.C. 1344). I am remanding the approved JD decision back to the district for reconsideration in light of this decision. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division office and appellant with its decision document and final JD.



TODD T. SEMONITE
Brigadier General, USA
Commanding